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ABSTRACT

Schools can lead the fight against tobacco use and addiction. As of December 1990, 39 states and the District of Columbia have legislation restricting or prohibiting smoking in school buildings or grounds. Kansas and New Jersey are the only states that currently ban the use of tobacco products in all school buildings. Sixteen states statutorily prohibit students from smoking at school. School districts in the other 34 states have discretion to decide whether to permit or inhibit student smoking. Many administrators report that designated smoking areas become a focal point of negative influence and exacerbate rather than lessen student management problems. Courts have upheld school district authority to adopt policies that prohibit students from smoking on school grounds. Most states allow school boards to decide whether to designate smoking areas for school personnel. The trend in litigated cases suggest a clear preference for adopting a total smoking ban applicable to everyone on a school campus. (MLF)

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JANUARY 1991 *National Association of Secondary School Principals* ISSN 0192-6152

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Smoking Policies: Implications for School Administrators

Surgeon General C. Everett Koop introduced the idea of a smoke-free America by the year 2000 in a speech to the American Lung Association in 1984.

Since there are more than 50 million smokers in the United States, that objective is formidable, yet it does have support.

- The American Medical Association, for example, has urged the medical community, educational institutions, and government agencies to publicize the health hazards inherent in the use of tobacco products and promote a smoke-free society by the end of this decade.
- The National Education Association announced it was joining the American Cancer Society, the American Heart Association, and the American Lung Association in a project to help make the 3.1 million first graders in 1988 become the first-ever class of high school graduates to enter adulthood free from cigarette addiction.
- The National School Boards Association is involved with a project called "Tobacco-Free Young America by the year 2000."

Schools are in a prime position to lead the fight against tobacco use and addiction by implementing a comprehensive health curriculum so students of all ages have an opportunity to learn about the health consequences of smoking. They can deter students before they start smoking and provide assistance for smokers who wish to stop. Schools can also create a smoke-free school environment by prohibiting all smoking on school grounds.

This *Legal Memorandum* will identify and analyze various legal factors that influence implementation and enforcement of school district smoking policies.

The Historical Perspective

Attempts to restrict or prohibit smoking actually began more than 100 years ago. In *Commonwealth* v. *Thompson* (Mass. 1847), a court upheld an 1847 Boston city ordinance prohibiting smoking on the city streets. The ordinance was adopted under the local government police power to guard against the threat of fire.

Fifty years later, in *Austin* v. *State* (Tenn. 1898), the Tennessee Supreme Court upheld a state statute prohibiting the sale of cigarettes. The court's opinion referred to the "noxious and deleterious" effect of cigarettes on human health, the "impairment of physical health and mental vigor" caused by smoking, and the fact that cigarette addiction left many men unfit for military service. On appeal, the U.S. Supreme Court held that the statute was a valid exercise of state police power since the prohibition was designed to protect public health.

By 1921, 14 states had adopted some form of legislation penalizing cigarette smoking. However, by 1927, all the statutes forbidding the use of cigarettes in public had been repealed. Changing attitudes about smoking at the end of World War I and the failure of Prohibition contributed to the demise of most anti-smoking laws.

After the Surgeon General's 1964 Report on Smoking and Health, anti-smoking legislation had a resurgence. The combination of medical evidence, greater interest in personal health and wellness, and the invigorated militancy of nonsmokers asserting previously unclaimed rights led to an avalanche of new legislation. The pre-1927 laws, enacted to enforce moral behavior and prevent fire hazards, are distinguished from modern statutes designed to protect nonsmokers from the harmful effects of "environmental tobacco smoke" (ETS).

Modern Legislation

Governing bodies at all levels have passed legislation to protect the rights of nonsmokers to breathe "clean" air in a smoke-free environment. Although the

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federal government has not yet adopted national guidelines for smoking in public places, it has enacted several bills related to smoking and health.

For example, beginning in 1990, Congress eliminated smoking on virtually all domestic airline flights. Congress has delegated authority to wardens in federal prisons to establish no-smoking areas within the confines of the institution, and individual federal agencies have promulgated smoking regulations under their rule-making authority.

States have restricted the sale and distribution of tobacco products for many years. All 50 states tax cigarettes, and with the exception of West Virginia, all states require that persons be licensed before distributing or manufacturing cigarettes. Today, all but 5 states regulate the sale of tobacco products to minors.

Since 1964, many states have adopted legislation to restrict smoking in public places. In 1974, 5 states had enacted statutes to restrict smoking in public places. By 1986, 42 states had imposed legislative restrictions on smoking in public places. The most comprehensive statutes regulating smoking in public places are found in Alaska, Connecticut, Florida, Maine, Minnesota, Montana, Nebraska, New Jersey, Utah, and Washington.

Smoking Legislation Related to Schools

Concurrent with the trend in public place smoking regulation, legislation restricting smoking in school buildings and on school grounds has also increased. In 1986, statutes in 26 states imposed restrictions on student and school personnel smoking. As of December 1990, 39 states and the District of Columbia have legislation restricting or prohibiting smoking in school buildings or on school grounds.

Kansas and New Jersey are the only states that currently ban the use of tobacco products in all school buildings. While other states prohibit students from smoking, these two states prohibit everyone—including school personnel and visitors—from smoking in school district buildings.

Local school board authority to decide whether students or staff members have a "right" to smoke at school was abrogated by state legislative action. Other states that prohibit student smoking allow either discretionary or mandatory designation of smoking areas for adult employees. Careful reading of individual state statutes is necessary to determine to what extent a school district can or must accommodate smoking and nonsmoking school personnel and whether or not the statute is intended to preempt local or municipal regulation of smoking.

Regardless of the ultimate building-level result, these statutes provide at least some guidance to school districts in resolving whether smoking will be allowed in school buildings.

A survey conducted by the National School Boards Association indicates that during the 1988-89 school year approximately 95 percent of public school districts in the country had written policies that restrict or prohibit student and/or staff smoking. This is an increase from 87 percent for the same districts surveyed in 1986.

Seventeen percent of the districts surveyed ban smoking entirely by everyone in school buildings and on school grounds. Only 2 percent of the same districts banned adult smoking in 1986.

Thus, more and more school districts are recognizing an affirmative duty to respond to the smoking crisis and are exercising their policy-making authority to reduce the harm of smoking for smokers and nonsmokers alike. Though it has a less significant impact on non-users, smokeless tobacco may and probably should be incorporated in an overall tobacco or drug abuse policy.

Who Can Smoke and Where?

Most states allow those in charge of public buildings to designate smoking areas. In states without enabling legislation, many local governing bodies (and particularly schools) have used discretionary rule-making authority to create and enforce smoking policies.

Except for schools in Kansas and New Jersey, most local school boards must decide who, if anyone, will be allowed to smoke in the schools. Some boards may delegate responsibility for this decision to the discretion of building administrators. In either case, the decisionmaker is forced to balance the interests of smokers and nonsmokers and decide if, when, and where smoking will be permitted. Unlike many other administrative decisions, however, this one is complicated by the fact that the school district has certain unique and possibly competing interests to protect.

Should Students Smoke at School?

Sixteen states statutorily prohibit students from smoking at school. School districts in the other 34 states have discretion to decide whether to permit or prohibit student smoking. Many factors may influence a school district's decision:

•First, the Surgeon General's research shows that each day more than 3,000 American teenagers start smoking. Nearly one-half of current adult smokers in 1986 started smoking when they were younger than 18 years of age. More than three-quarters of current smokers had begun

smoking by age 20.

• Second, instruction about the dangers and health consequences of smoking are an important part of a comprehensive health curriculum. Twenty-three states require schools to incorporate materials about the harmful effects of smoking in school health curricula.

Minnesota, for example, requires that all schools in the state implement a Tobacco Use Prevention Program. Educational funding from the state is tied to the program. The state also mandates that all educational institutions in Minnesota that provide teacher training must offer programs in the personal use of, misuse of, and dependency on tobacco.

Studies show that traditional preventive educational efforts, although becoming more sophisticated, enjoy only mild success. Results of recent studies confirm that students smoke to impress peers, to look older, and to appear daring. Yet, feedback from peer-oriented cessation programs bring mixed reviews. Studies also show that teachers remain strong role models for young people and are aware of their influence.

If smoking prevention programs are to succeed, they must begin at an early age before adolescents become addicted to nicotine and they must have the unconditional support of teachers committed to a tobacco-free environment.

• Third, some principals and school districts have concluded that the best way to deal with adolescent smokers is to provide them a designated smoking area rather than force them to go off campus or to smoke covertly. The rationale is that students will inevitably smoke somewhere during the school day so it is better to have students on campus and in an area that requires less faculty and administration supervision.

Studies show that traditional preventive educational efforts, although becoming more sophisticated, enjoy only mild success.

On the other hand, many administrators report that designated smoking areas become a focal point of negative influence and exacerbate rather than lessen student management problems. Principals report that smoking areas can become meccas for drug use and trade, gang hangouts, and centers of negative peer pressure. Also noted has been the negative impact on public relations and custodial costs.

Study results reported in the January 1984 *NASSP Bulletin* characterized the type of student that frequented smoking areas as having difficulties with academics, attendance, discipline, drugs, and motivation. Such students were also found to be less involved with cocurricular activities and more likely to drop out.

Enforcement of student smoking prohibitions appears marginally successful. Penalties include common reprimands, confiscations, detentions, parental conferences, monetary fines, and varying length suspensions or expulsion. Despite the fact that some studies have shown compliance as high as 85 percent, the remaining students account for an inordinate amount of supervision and administrative attention.

Courts have upheld school district authority to adopt policies that prohibit students from smoking on school grounds. In *Randol* v. *Newberg Public School Board* (Or. Ct. App. 1975), an Oregon high school student challenged school district authority to prohibit tobacco use on school grounds. The student was expelled for smoking at school after she was warned of the consequences of such behavior. The court found that the board of education acted properly in enforcing the smoking rule.

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Craig v. *Buncombe County Board of Education* (N.C. Ct. App. 1986), involved several high school students suspended from school for smoking violations. The court held that a smoking ban was a valid exercise of school board authority despite the students' claim that the smoking prohibition denied their "fundamental right" to an education and violated equal protection guarantees since teachers were allowed to smoke in the teachers' lounge.

The court ruled, however, that the only right deprived by the policy is the right to use or possess tobacco on school grounds during school hours. The court also held that it is within the power of local boards of education to "adopt policies governing the conduct of students" under the board's position *in loco parentis*.

The court recognized reasonable differences between students and teachers which justified banning student smoking while allowing adult school personnel to smoke in the teachers' lounge. As more research is conducted on the detrimental effects of ETS, however, it is arguable whether this court's distinction between students and

teachers will remain valid.

Should Teachers Smoke at School?

Most states allow school boards to decide whether to designate smoking areas for school personnel. Consequently, the board is caught between adult smokers asserting a right to smoke in public and nonsmokers claiming a right to a smoke-free environment.

School personnel who wish to smoke at work have several bases on which to assert a right to smoke:

- The right to smoke in public is a "protected" right
- The scientific research regarding ETS is unconvincing
- Cigarettes are a legal product and, as adults, school personnel have the right as a matter of personal choice to decide whether to smoke.

The courts have not been kind to smokers claiming a protected right to smoke in public. For example, in *Grusendorf* v. *City of Oklahoma City* (10th Cir. 1987), a fire fighter trainee challenged an Oklahoma City ordinance prohibiting trainees from smoking on or off duty for one year. He was discharged for taking three puffs of a cigarette while on his lunch break.

The argument that teachers, as adults, should have the right to use a legal product has merit; however, that right extends only to such use that does not harm others.

The court concluded that the city had a legitimate interest in protecting the health of its fire fighters and thus found no violation of a constitutionally protected right. Cigarette smoking is a known health hazard that could affect a fire fighter's job performance. The same could probably be said of teachers within the context of their role-modeling effect on students.

The argument that scientific research has not proven ETS to be harmful is frequently advanced by smoking advocates and the Tobacco Institute. While the 1989 Surgeon General's Report agrees that further research is needed in this area, it refutes the Tobacco Institute claim by suggesting that of 16 epidemiologic studies examining ETS exposure and lung cancer in nonsmokers, 14 noted a positive association.

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In some settings, accommodations for smokers are simple and inexpensive.

However, in most school facilities, existing ventilation systems and structural components are not readily modified to accommodate smokers. Budgetary constraints frequently limit school district options and prohibit costly structural changes.

Nonsmoking employees may assert a variety of claims to compel a school district employer to provide a safe or smoke-free workplace. Relief sought may be in the form of an injunction to restrict or prohibit workplace smoking, or a claimant may seek other types of compensation or damages.

Lawsuits brought by nonsmokers generally fall in one or more of several categories:

- The school district's common-law duty to provide employees with a safe workplace
- A constitutional right to a smoke-free environment
- Unemployment compensation, workman's compensation, or disability benefits when conditions in the school force a nonsmoker to terminate his or her employment
- Handicapped status under the Federal Rehabilitation Act
- Wrongful discharge
- Assault and battery.

A summary of cases brought by nonsmokers sheds light on the relative merits of each argument.

In *Shimp* v. *New Jersey Bell Telephone Co.* (N.J. Super. Ct. Ch. Div. 1976), a telephone company employee who was allergic to cigarette smoke obtained an injunction to force her employer to restrict smoking by other employees to nonwork areas. Nonsmoking plaintiffs in other cases have also been successful in obtaining injunctive relief by asserting a claim based on an employer's common-law duty to provide a safe workplace.

Courts have recognized employees' claims for workers' compensation in cases where the employee suffered an adverse reaction to workplace smoke.

In *McCarthy* v. *Dep't of Social & Health Services* (Wash. 1988), the Supreme Court of Washington recognized a plaintiff's claim that the state owes its employees a duty to provide a safe place to work. The plaintiff, who developed "chronic obstructive pulmonary disease" as a result of working in a smoke-filled office, eventually settled for $27,000. The court stated that an employer's duty is to

take reasonable steps to accommodate an employee's particular sensitivities.

With the exception of several suits brought by nonsmoking prisoners, nonsmokers have had virtually no success in establishing rights to a smoke-free environment based on the U.S. Constitution. In *Gasper* v. *Louisiana Stadium & Exposition District* (5th Cir. 1978), a group of nonsmokers brought an action to prohibit tobacco smoking during events in the New Orleans Superdome. The suit was dismissed and the court held that the decision whether smoking should be allowed in the Superdome should be left to those in charge of the facility.

Several nonsmokers who terminated their employment due to an inability to work in a smoke-filled environment succeeded in obtaining unemployment benefits. For example, in *Alexander* v. *Unemployment Insurance Appeals Board* (Cal. Ct. App. 1980), the court held that a smoke-sensitive hospital X-ray technologist who left her job was eligible for unemployment compensation. The employer had a no-smoking policy in place but did not enforce it. As a prerequisite for unemployment benefits, the court established that the plaintiff was looking for and was willing to accept comparable work in a smoke-free environment.

In a 1987 Pennsylvania case, *Lapham* v. *Commonwealth Unemployment Compensation Board* (Pa. Commw. Ct. 1987), the court allowed a claimant with allergic bronchitis aggravated by exposure to cigarette smoke to collect unemployment benefits. The court said the employer failed to show that a reasonable accommodation had been offered that would not be harmful to the health of the claimant.

Adoption or modification of school smoking policies can be politically controversial.

Courts have recognized employees' claims for workers' compensation in cases where the employee suffered an adverse reaction to workplace smoke. *Johannesen* v. *New York City Department of Housing Preservation and Development* (N.Y. A. D. 3 Dept. 1989), held that an employee who began to suffer bronchial asthma as a result of her repeated exposure to tobacco smoke suffered a compensable "accidental injury."

Similarly, in *Schober* v. *Mountain Bell Telephone* (N.M. Ct. App. 1980), workers' compensation was awarded to a claimant who collapsed at work as a result of cigarette smoke exposure. The employee had been discharged for excessive absences due to his smoke allergy.

In *Vickers* v. *Veterans Administration* (W. D. Wash. 1982), an employee successfully demonstrated that he was handicapped by the inhalation of trace amounts of tobacco smoke in his work area. However, since the employer had attempted to accommodate the employee's needs by securing no-smoking pledges from the plaintiff's coworkers and by improving ventilation, the court held that under the Federal Rehabilitation Act the employer was not obligated to provide a totally smoke-free environment.

Hentzel v. *Singer Co.* (Cal. Ct. App. 1982), involved an employee terminated for protesting hazardous working conditions due to a smoke-filled work area. A trial was ordered to determine whether the employee was a victim of a retaliatory discharge.

There are limits, however, in how far a court will go to recognize a nonsmoking employee's tort claim against his or her supervisor. In *McCracken* v. *Sloan* (N.C. Ct. App. 1979), a postal employee with an allergic condition claimed that his supervisor committed an assault and battery when the supervisor insisted on smoking a cigar in the employee's presence. The case was dismissed, with the court reasoning that since the employee did not suffer any physical illness from inhaling the cigar smoke the supervisor's behavior did not constitute a battery and was simply an assault "which must be endured in a crowded world."

In light of recent scientific research on the harmful effects of ETS it is questionable whether the same court today would require the same proof of injury as was required of the plaintiff in *McCracken*.

Schoolwide nonsmoking policies have, on occasion, been grieved by employee groups in the collective bargaining context. Authority is split as to whether board adoption of smoking policies is subject to mandatory negotiation. Unions are caught in a predicament when deciding how aggressively they will attack a smoking ban since the majority of union members are frequently nonsmokers.

Conclusion

School districts should consider the weight of scientific research and the trend in litigated cases before adopting and enforcing no-smoking policies on school premises. This would suggest a clear preference for adopting a total smoking ban applicable to everyone on a school campus.

In addition to current medical research, other reasons supporting this conclusion include the role-modeling effect that teachers who smoke have on the health curriculum and the risk of liability from lawsuits brought by nonsmokers asserting a right to a smoke-free workplace.

Adoption or modification of school smoking policies

can be politically controversial. In a sense, the school district is in a "no-win" situation: If smoking is allowed in designated areas, the district may end up defending a variety of different types of nonsmoker lawsuits; if smoking is banned, the district may face employee dissatisfaction and possible collective bargaining grievances—particularly if the ban is imposed without negotiation.

To date, however, the threat of backlash litigation brought by smokers denied the right to smoke has not found much support. As in most other situations, school districts are better off performing actively rather than reactively. But a total ban on smoking is the strongest statement a district can make to show that it cares about its students and employees. Districts and administrators must balance the rights of students and teachers; smokers and nonsmokers; and the rights of employees and their responsibilities as providers of educational services and employment.

Schools reluctant to face the smoking issue at the local level have another option. They may lobby state legislators for statewide smoking laws similar to those in Kansas and New Jersey, which ban all smoking in school buildings.

Such legislation shifts the brunt of criticism from the local to the state level. Legislators can be approached individually or, perhaps, by groups such as state school board associations, school administrator groups, or parent alliances.

Scientific evidence regarding the effects of cigarette smoking not only upon the health of the smokers but upon others inhaling it in the air around them has begun to move our society toward the elimination of smoking in public places. An even stronger consensus is emerging in support of efforts to eliminate smoking by young people in order to protect their health.

Both of these changes in public perceptions are strongly reflected both in state legislation and court decisions. Ultimately, however, the choice of what policies should be adopted by schools in regard to smoking on their premises will continue to be the responsibility of schools and their administrators.

Reference

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This Legal Memorandum was written by Fred Hartmeister, staff attorney, Wyoming Supreme Court, Cheyenne, Wyo., and Rich Daugherty, associate professor of educational administration and teacher education, South Dakota State University, Brookings, S.Dak. The memo is a revised version of an article that first appeared in West's Education Law Reporter *(September 27, 1990) and is used by NASSP with permission.*

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